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No. 580

Supreme Court of the United States.

OCTOBER TERM, 1943.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, PETITIONER,

v.

ABRAHAM GOLDBERG, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

F. H. NASH,
C. J. HOYT,
Attorneys for Petitioner.

Bailey Aldrich,
Of Counsel.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

Subject Index.

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STATUTES.

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THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, *Petitioner,*

v.

ABRAHAM GOLDBERG, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honourable the Justices of the Supreme Court of the United States:

The undersigned, on behalf of The Columbian National Life Insurance Company, petitioner, pray that a writ of certiorari may issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered August 31, 1943, as to which a rehearing was denied October 5, 1943, in the case between the above-named parties, docketed therein as No. 9464, affirming in part the judgment of the District Court for the Northern District of Ohio, Eastern Division, wherein the petitioner was defendant and the respondent plaintiff.

Opinions Below.

The memorandum opinion of the District Court (R. 74-76) was not published. The opinion of the Circuit Court of Appeals (R. 111-118) is published in 138 F. (2d) 192.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 31, 1943, and a petition for rehearing was denied October 5, 1943.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended, U.S.C. Tit. 28, § 347.

The jurisdiction of the District Court was based upon Section 274(d) of the Judicial Code, as amended, U.S.C. Tit. 28, § 400.

Questions Presented.

1. Is a judgment by a court sitting without jury to be affirmed where the court, though requested, fails to separate its findings of fact from its ultimate conclusion of law?

2. Is such a judgment, where the District Court has expressly refused to resolve a disputed question of fact, to be affirmed by the device of treating a ruling of law by the District Court as though it were a finding of fact warranted by the evidence?

3. Is not the Federal Court bound by the Ohio decisions that the burden is on the plaintiff to prove that he has brought himself within the insuring clause of his policy?

Statement of the Case.

The plaintiff below brought a petition for declaratory judgment against his insurer, the defendant below, asserting that although in his application for his policy he had stated his birth date to be December 15, 1878, in truth he was born on December 15, 1880. He asked that the policy be reformed so as to provide a higher face proportioned

to the lower premium consistent with his younger age, and asked further that it be adjudged that he was entitled to disability benefits under the accident and health contract for a total and permanent disability beginning July 1, 1938.

The policy provided for an adjustment of the insurance proportioned to the premium at the true age in case of misstatement of age. The accident and health contract, a part of the policy, provided:

> "If after one year's premium shall have been paid on this policy and before default in the payment of any subsequent premium the insured shall furnish to the company due proof that before attaining the age of sixty he has become wholly disabled by bodily injury or disease so that he is and thereby will be permanently and continuously unable to engage in any occupation whatever for remuneration or profit . . . thereupon the company will by endorsement hereon waive the payment of the premiums which thereafter may become due under this policy during the continuance of the said total and permanent disability of the insured."

The suit resulted in a finding that the insured became totally and permanently disabled on July 1, 1938. If he was born before July 1, 1878, his sickness did not bring him within the policy. If, however, he was born after July 1, 1878, he was entitled to the waiver of premium benefits. The vital point in the case is whether he was born before or after July 1, 1878. Although the date given in his application was December 15, 1878, he filed an affidavit (R. 72) that he believed the correct date of his birth to be December 15, 1880. Then he testified that he was born in December 1879 (R. 15). But his naturalization record showed that he was born May 15, 1878. The record is full of statements by him in which for the purpose of birth and

marriage records, etc., he had stated that he was born on various dates both before and after July 1, 1878.

The trial court in its memorandum opinion (R. 74-76) said that the evidence as to the plaintiff's birth date was in hopeless conflict, but held as matter of law that the policy established the date December 15, 1878, as conclusive.

> "It is the opinion of the court that the rights of the parties should be controlled by the date given in the policy. The Insurance Company knew, or should have known, the limits of the plaintiff's knowledge and his want of education at the time of issuing the policy. It should have satisfied itself then as to the correct age." (R. 76.)

This conclusion of law was the sole basis of the so-called "finding" submitted by the plaintiff's attorney and adopted by the court over the defendant's objection (R. 79-82), that the birth date was December 15, 1878. The court declined to state separately its findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure (R. 78). Under this decision, coupled with the finding (not assailed on appeal) that disability began July 1, 1938, the District Court decreed that the plaintiff was entitled to disability benefits. The Circuit Court of Appeals affirmed on the ground that the District Court had made a finding of fact supported by evidence, on a point as to which it erroneously held that the burden under the state law was on the defendant.

Specifications of Errors.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court when the District Court had failed to find the facts specially and state separately its conclusions of law thereon.

2. In affirming the judgment of the District Court on the ground of its having made a finding supported by evidence when the so-called finding

a) was unsupported by any evidence and
b) was in fact an erroneous conclusion of law.

3. In ruling that the burden of proving the plaintiff was not sixty when he became totally disabled was on the defendant.

Reasons for Granting the Writ.

(1) The Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The plaintiff below sought a declaration that he was entitled to disability benefits under a contract which provided he must be under sixty years of age when the disability commenced. The policy contained an age adjustment clause. Before filing his petition, and in the petition itself, the plaintiff repudiated the date of birth he had given in the application for the policy. Neither his evidence *nor* the defendant's evidence supported the application date. Nevertheless the District Court selected that date. It is demonstrably apparent from its memorandum opinion that the District Court selected this date as a conclusion of law on the theory that the company was legally bound by the application date (R. 76). The court expressly stated that it was not attempting to resolve the conflicting evidence on the date of birth as a question of fact (R. 75). The plaintiff below (see R. 79) prepared a document entitled "Findings of Fact, Conclusions of Law and Journal Entry," which he submitted to the defendant (R. 84). The defendant thereafter moved that the court find the facts separately under Rule 52(a) (R. 78). The court signed the document submitted by the plaintiff (R. 84), and *overruled the defend-*

ant's motion to make separate findings of facts (R. 78). This procedure was approved by the Circuit Court of Appeals.

(2) The Circuit Court of Appeals further departed from the accepted and usual course of judicial proceedings by predicating on this error of the District Court a further error of its own. The Circuit Court of Appeals affirmed the judgment of the District Court based on a conclusion of law, on the ground that it was based on a finding of fact supported by evidence, when there was no such finding *or any evidence to support it*. As a result the defendant stands concluded by a so-called finding of fact attributed to the District Court on an issue as to which that court expressly made no finding, and as to which there was no evidence in the record.

(3) The Circuit Court of Appeals erred in ruling that because of Ohio cases placing the burden of proving fraud or breach of warranty was on an insurer seeking to rescind, the burden was on the defendant to prove that the policy requirement that the plaintiff be under sixty when his disability commenced had not been met. In so ruling the court plainly disregarded, without discussion, settled apposite Ohio decisions.

Armstrong v. *Insurance Company*, 4 Ohio App. 46, 54.

John Hancock Mutual Life Ins. Co. v. *Hicks*, 43 Ohio App. 242, 183 N.E. 93.

Prayer.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Circuit Court of Appeals for the Sixth Circuit commanding said court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of

the said Circuit Court of Appeals in this case which was entitled in that court: *The Columbian National Life Insurance Company, Defendant-Appellant,* v. *Abraham Goldberg, Plaintiff-Appellee,* No. 9464, to the end that said cause may be reviewed and determined by this Court as provided by Section 240 of the Judicial Code as amended (U.S.C. Title 28, § 347), and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgment of said Circuit Court of Appeals in the said case may be reversed by this Honourable Court and your petitioner will ever pray.

THE COLUMBIAN NATIONAL LIFE INSURANCE COMPANY,
By F. H. NASH,
C. J. HOYT,
Counsel for Petitioner.

Dated December 20, 1943.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS:

F. H. Nash, being duly sworn, says that he is counsel for The Columbian National Life Insurance Company, the petitioner herein; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

F. H. NASH.

Sworn to and subscribed before me, this 20th day of December, 1943.

CARTER LEE,
Notary Public.